United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

NO. 75-4095

United States Court of Appeals

FOR THE SECOND CIRCUIT

Nos. 75-4095 – 75-4147

B
P/S

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LOCAL UNION 798 OF NASSAU COUNTY, NEW YORK,
BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL-CIO,
Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that the Union violated Section 8(b)(1)(A) and (2) of the Act by causing employers to agree to a hiring arrangement which required 3 years' continuous membership in good standing in the Union as a condition of obtaining employment.

2. Whether substantial evidence on the record as a whole supports the Board's finding that the Union violated Section 8(b)(3) of the Act by proposing, insisting upon, and striking to obtain an unlawful hiring clause in a collective bargaining contract.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), for enforcement of its order issued on July 30, 1974, against Local Union 798 of Nassau County, New York, Brotherhood of Painters and Allied Trades, AFL-CIO (herein the "Union") (No. 75-4095). The Union filed a "Cross-Application to Review" the Board's order (No. 75-4147). The Board's decision and order is reported at 212 NLRB No. 89 (A. 14-28).[1] The Court has jurisdiction, the unfair labor practices having occurred in Garden City, New York, within this judicial circuit.

I. THE BOARD'S FINDINGS OF FACT

A. Background

Nassau Division of the Master Painters Association of Nassau-Suffolk Counties, Inc. (herein "Painters Association") and Nassau Division of the Gypsum Drywall Contractors, Inc. (herein "Drywall Contractors") are associations composed of many employers[2] engaged in painting and decorating

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[1] "A." references are to the appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] The names of these employers appear in the appendix (A. 48-54).

services, and drywall construction in the building and construction industry (A. 4). The Union is and has been for over 10 years the recognized representative of all journeymen and apprentice painters and decorators, and all journeymen and apprentice drywall painters, tapers, texturizers, and finishers employed by members of the Painters Association and Drywall Contractors (A. 5; 72).

Employer members of both the Painters Association and Drywall Contractors have relatively stable complements of employees who move from job to job at their employer's direction. When a need arises for additional help, the employer may request a referral from the Union or another employer or may hire individuals from the street (A. 6; 74, 117).

It has been the practice of the Painters Association and Drywall Contractors (jointly referred to as the "Association"), when representing their members in collective bargaining, to bargain jointly with the Union with the resulting contract binding on members of both groups (A. 14; 72).

Under bargaining agreements between the Union and the Association in the period preceding the events involved here, the Union was permitted to designate a steward on each job from each employer's existing complement of employees (A. 17, 6; 97). In making the steward selection the Union was governed by its bylaws requring that stewards must be members of the Union in continuous good standing for 3 years (A. 15, 7).

B. The new stewards clause

Negotiations between the Association and the Union for a contract to replace one scheduled to expire on March 31, 1973, began on December 13, 1972, and continued through April 30, 1973 (A. 7; 75-76). At the outset of negotiations, the Union proposed to change the past stewards

clause to one providing that (A. 15; 77-78, 120, 122, 61, 63):

> (15) All stewards for all jobs to be designated from the Union Hall from the ranks of the unemployed members.

The Association refused to accept this demand because its members did not want to be required to employ a "stranger" on each job, that is, someone from outside the regular crew (A. 18; 79, 82-83). The Union informed the Association during negotiations that its position on the stewards clause was prompted by a desire to promote a turnover of men to get the unemployed on jobs (A. 18; 82). However, the Union's recording secretary, John Blusonis, testified that the primary purpose for the stewards clause was to enforce the contract more effectively (A. 18; 132-133). He stated that (A. 133):

> . . . . in the old agreement the union would designate already one of the men that were employed. Therefore, there actually was no representation for the union to enforce our trade rules . . . .
>
> If a man works in a shop or [for] an employer for years, his primary interest is working for the employer and having a steady job. His interest is not for the benefit of his fellow members.

On March 29, 1973, the parties met but were unable to resolve their differences on three issues: (1) a steward's clause, (2) wage rates, and (3) length of the contract. While the parties were, at that time, still relatively flexible on wage rates and length of the contract, they had come to a complete impasse on the steward's clause (A. 15, 8; 85-87). The Union refused to accept any contract unless it gave the Union the right to select one individual to be employed on each job as steward. The Association was unwilling to so delegate its members' hiring authority to the Union (A. 15; 87, 131, 138). Consequently, the Union struck the

employers on April 1, 1973, and the strike continued for approximately 30 days. Negotiations continued during the strike (A. 15; 8, 88).

On April 30, 1973, the Association agreed to accept the Union's stewards clause with minor changes (A. 16; 91). These changes limited the application of the clause to jobs requiring the service of more than one man, and provided that the clause would be subject to renegotiation after one year (A. 16; 91-92). The parties thereafter resolved their differences on wage rates and agreed to a 3-year term for the contract (A. 16; 91-92, 64-66).

The new contract contained the following provision for the selection of stewards (A. 16; 66):

> The Union, through the business representative, shall designate a qualified journeyman as a steward on each and every job . . .
>
> (a) There shall be a one year trial basis on the steward program subject to reopening at the expiration of the first year of this agreement: the reopening limited to this item only.
>
> * * *
>
> (d) One-man jobs to be exempt from the stewards program subject to investigation by the business representative.

The parties understood that this provision delegated to the Union the authority to select one individual for employment, who would serve as steward, on each of the employers' jobs where more than one employee was required (A. 17-18; 108-109, 126-127). It was further understood that, in accordance with the Union's bylaws, the individual selected would be a member of the Union in continuous good standing for 3 years, and that regular employees of the employers would not be selected because the Union presumed that such persons would not be sufficiently loyal to the Union (A. 17-18; 126-127, 132-133).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board found that the Union violated Section 8(b)(1)(A) and (2) of the Act by insisting on a hiring arrangement which required employers to give preference in employment to persons who had been members of the Union for 3 years. The Board further found that, by conditioning a collective bargaining agreement on the inclusion of the illegal preferential hiring arrangement, the Union violated Section 8(b)(3) of the Act.

The Board's order requires that the Union cease and desist from the unfair labor practices found, and from in any like or related manner coercing employees in the exercise of rights guaranteed them by Section 7 of the Act. Affirmatively, the Board's order requires the Union to delete the unlawful stewards clause from its contract with the Painters Association and Drywall Contractors, and to post the appropriate notices.

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE UNION VIOLATED SECTION 8(b)(1)(A) AND (2) OF THE ACT[3] BY CAUSING EMPLOYERS TO AGREE TO A HIRING ARRANGEMENT WHICH REQUIRED 3 YEARS' CONTINUOUS MEMBERSHIP IN GOOD STANDING IN THE UNION AS A CONDITION OF OBTAINING EMPLOYMENT.

Section 8(b)(1)(A) and (2) of the Act makes it unlawful for a union to cause or attempt to cause employer discrimination "aimed at encouraging employees to join, retain membership, or stay in good

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[3] Section 8(b)(1)(A) and (2) of the Act provides, in pertinent part, that:

> (b) It shall be an unfair labor practice for a labor organization or its agents –
>
> (1) To restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . . (continued)

standing in a union . . . ." *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 42 (1954). Thus, the elements of the offense are two: (1) discrimination in employment, and (2) encouragement or discouragement of union membership.

As in the *Radio Officers'* case, *supra*, the issue in this case is not whether the stewards clause will cause employment discrimination, but rather whether the discrimination will "encourage membership in any labor organization" *Id.* at 39. Thus, the discrimination is clear from the undisputed facts. Under the stewards clause, both as proposed and as agreed upon, one position on each job would be reserved for an individual selected by the Union to serve as steward. The selection by the Union is governed by the requirement in the Union's bylaws that a steward be a member in continuous good standing for 3 years. Although the clause as agreed to does not on its face require an employer to create a vacancy in order to accept a steward referred by the Union, that was clearly the purpose of the clause. This is shown by the Union's original version of the proposed clause, the testimony of its recording secretary, as well as the testimony of the Association's principal bargaining representation. As the Board found, "the intent of the proposed clause, which was the central issue in the negotiations, and of the agreed-upon clause, as understood by the parties, was to permit [the Union] to require the hiring

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[3] (continued)

> (2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . . .

Section 8(a)(3) of the Act provides, in pertinent part, that:

> (a) It shall be an unfair labor practice for an employer- . . . .
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

of persons designated by the Union to serve as stewards, it being understood that there would be new hires selected from outside the employers' regular work crews" (A. 19). The effect of the agreed-upon clause was not only to require that the person selected for the vacancy be a union member, but that, as required by the Union's bylaws, he be a member in continuous good standing for 3 years. It is well settled that the Act not only prohibits discrimination between union members and non-members, but it also prohibits discrimination among members on the basis of the extent of their union activity. *Local 138, International Union of Operating Engineers v. N.L.R.B.*, 321 F.2d 130, 136 (C.A. 2, 1963); *Brewers Local Union 6 v. N.L.R.B.*, 301 F.2d 216, 219-224 (C.A. 8, 1962); *N.L.R.B. v. Chicago Roll Forming Corp.*, 418 F.2d 346, 347-349 (C.A. 7, 1969); *General Truckdrivers, Local 5 v. N.L.R.B.*, 389 F.2d 757, 758-760 (C.A. 5, 1968).

In the circumstances thus shown, there is no basis for disputing the Board's finding that the discrimination effected by the stewards clause would inherently encourage (1) membership in the Union, and (2) continuous membership in good standing. These unlawful effects of the admitted discrimination were thus reasonably forseeable, and the Board properly concluded that the Union violated Section 8(b)(1)(A) and (2) of the Act. *Radio Officers' Union v. N.L.R.B., supra,* 347 U.S. at 42-51. Accord: *N.L.R.B. v. Local 282, International Brotherhood of Teamsters,* 412 F.2d 334 (C.A. 2, 1969), cert. denied, 396 U.S. 1038; *N.L.R.B. v. United Brotherhood of Carpenters,* 321 F.2d 126, 128-129 (C.A. 9, 1963), cert. denied, 375 U.S. 953; *N.L.R.B. v. Southern Stevedoring Co.*, 332 F.2d 1017, 1019 (C.A. 5, 1964); *International Union of Electrical Workers, Frigidaire Local 801 v. N.L.R.B.*, 307 F.2d 679, 682 (C.A.D.C., 1962), cert. denied, 371 U.S. 936.

The Union mistakenly relies upon what it asserts is a legitimate objective – effective policing of the collective bargaining agreement – as

justification for the discrimination resulting from the stewards clause. Even assuming that this legitimate purpose motivated the Union's insistence on the clause, the Union's "protestation that [it] . . . did not intend to encourage or discourage must be unavailing where a natural consequence of [its] . . . action was such encouragement or discouragement" *Radio Officers' Union v. N.L.R.B., supra,* 347 U.S. at 45; *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221, 224-230 (1963); *N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26, 31-35 (1967) (". . . if it can reasonably be concluded that the . . . discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an . . . [unlawful] motivation is needed and the Board can find an unfair labor practice even if the [respondent] . . . introduces evidence that the conduct was motivated by business considerations." *Id.* at 34). While it is true that the Union has a legitimate interest in appointing stewards and policing contracts, in the arrangement insisted upon here the Board found that the Union "impinged on the employment relationship in a manner irrelevant to legitimate union interests" (A. 20). As the Board stated, "Any failure of stewards who were already employed to enforce the trade agreements could surely be controlled by appropriate union training or, if necessary, by internal union discipline of stewards who failed to perform responsibly" (*ibid.*).

The Administrative Law Judge and dissenting Board members relied on the fact that the collective bargaining agreement between the parties requires an employee to become a member of the Union within 8 days after being hired (G.C. Exh. 4, pp. 5-6).[4] They reasoned that because of this clause, all regular crew members of an employer were likely to be

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[4] Section 8(a)(3) of the Act authorizes employers and unions in industry generally to enter into union security agreements requiring union membership on or after 30 days of employment, but Section 8(f), which applies to the building and construction industry, authorizes union membership to be required after 7 days of employment.

union members, and it was therefore unlikely that the hiring of a steward would cause the displacement of a non-union employee. The Board reasonably held, however, that the fact that an 8-day union security clause is permissible in this industry does not mean that a closed shop agreement requiring union membership as a condition of employment is permissible. As the Board observed, "Congress chose to permit agreements that an employee hired on a nondiscriminatory basis can be required to become a union member at an earlier date than in other industries, but it deliberately did not sanction the imposition of union membership as a condition of hire" (A. 20). It is further significant that the arrangement agreed to here did not merely require the person hired for the steward vacancy to be a union member, but a member of 3 years' continuous good standing, a requirement which goes far beyond the 8-day clause authorized by Section 8(f) of the Act.

II. SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE UNION VIOLATED SECTION 8(b)(3) OF THE ACT BY PROPOSING, INSISTING UPON, AND STRIKING TO OBTAIN AN UNLAWFUL HIRING CLAUSE IN A COLLECTIVE BARGAINING CONTRACT

The Act "establish[s] the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment. . . .' The duty is limited to those subjects, and within that area neither party is legally obligated to yield." *N.L.R.B. v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958), quoting Section 8(d) of the Act. As to subjects on which the statute does not mandate bargaining, a party may propose bargaining but may not insist upon it. *Id.*, at 349. Accordingly, a union violates its bargaining obligation under Section 8(b)(3) of the Act when it proposes and insists upon an agreement that would require

an unlawful infringement of employee rights under Section 7 of the Act. *Sperry Systems Management Division, Sperry Rand Corp. v. N.L.R.B.*, 492 F.2d 63, 69-70 (C.A. 2, 1974), cert. denied, 419 U.S. 831 (1974). See also *N.L.R.B. v. Local 964, United Brotherhood of Carpenters*, 447 F.2d 643 (C.A. 2, 1971); *N.L.R.B. v. Bricklayers & Masons, Local 3*, 405 F.2d 469 (C.A. 9, 1968).

As we have shown above, the stewards clause which the Union sought and secured was unlawful under Section 8(b)(1)(A) and (2) of the Act. Accordingly, the Union's introduction of, insistence upon, and striking to obtain this unlawful hiring clause obstructed the course of collective bargaining as to lawful and mandatory subjects, and constituted a violation of Section 8(b)(3) of the Act.

CONCLUSION

For the foregoing reasons, we respectfully request that a judgment be entered enforcing the Board's order in full.

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September 1975.

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	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 12th day of September, 1975